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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 712

IN THE MATTER

of

ST. CHARLES HOTEL COMPANY,
Alleged Bankrupt.

HARRY CASSMAN, as Receiver of St. Charles Hotel Company, appointed by the Chancery Court of the State of New Jersey,
Petitioner,

against

ABRAHAM KURZROCK, KATIE BOSSHARD, and MURIEL J. BRYER, as Petitioning Creditors of an involuntary petition in bankruptcy filed against St. Charles Hotel Company,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SAMUEL MILES FINK,
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I

Duggan v. _Sansberry_, 327 U. S. 499, is in no wise applicable to the case at bar.

We did not discuss that case in our main brief because we deemed nothing in its precise holding, nor anything in the opinion applicable to the instant case. In their ref-

erence to it, the respondents distort its specific ruling and misinterpret certain of Judge Rutledge's language.

It will be recalled that the order of events in the Duggan case was, in crude outline, the following:

(a) A petition under Chapter X of the Bankruptcy Act for reorganization of a parent corporation was filed in a District Court in Missouri.

(b) Then an involuntary petition in bankruptcy was filed against an alleged subsidiary corporation in a District Court in Indiana.

(c) Subsequently, a petition for reorganization under Chapter X of the alleged subsidiary was filed in the same Missouri District Court as already had jurisdiction over the parent corporation.

In the last proceeding, an order was entered staying the sale of the subsidiary's assets in the Indiana bankruptcy proceedings. The Indiana court ignored that order and sold the assets on the express or implied holding that no parent-subsidiary relationship existed.

This Court's sole specific ruling was that the parent-subsidiary issue relationship should have been determined in the subsidiary's reorganization proceedings pending in Missouri. It should not have been decided collaterally in the bankruptcy proceedings in Indiana (327 U. S. at pp. 507-8). The Missouri District Court had obtained exclusive and paramount jurisdiction over the subsidiary by virtue of Section 111 of the Bankruptcy Act, 11 U. S. C. 511, which vests a Reorganization Court with exclusive jurisdiction over the debtor and its property wherever located, once a petition for reorganization is approved. If the Bankruptcy Court could properly proceed with administration of the subsidiary's affairs after the reorganization petition had been filed, there would

be two bankruptcy courts with jurisdiction over the assets of the subsidiary. That would be in violation of the aforesaid statutory provision, and in violation of the declared intent of Congress to reorganize parent-subsidiary corporations in one court wherever possible.

It is plain from the foregoing that the problem which was presented by *Duggan* v. *Sansberry* was wholly different from the one we wish the Court to consider in the instant case. No parent-subsidiary corporate question is here involved. We do not have a clash of jurisdiction between two District Courts, with its attendant problem of paramountcy. Instead, we present a question of the extent of jurisdiction of a single District Court. May a single District Court, sitting as a Bankruptcy Court, seek to entertain jurisdiction over a debtor and its assets while still entertaining jurisdiction over them as a Reorganization Court? That question is not answered by any provision of the Bankruptcy Act, and has never been considered by this Court.

Respondents contend that the Duggan case supports the rulings heretofore made in this case because of a digressive remark made in a portion of the decision remote from the main discussion. After treating the central issues outlined above, Judge Rutledge came to consideration of an argument advanced that because no "final" order had been entered by the Missouri Reorganization Court under Section 149, 11 U. S. C. 549, approving the subsidiary's petition for reorganization, it was proper for the Indiana Bankruptcy Court to sell the assets. In rejecting this view, Judge Rutledge pointed out that the Reorganization Court had stayed the bankruptcy proceedings under Section 113, 11 U. S. C., 513, and because of its paramount jurisdiction conferred by Section 111, the stay was effective on the Bankruptcy Court. In discussing this point, Judge Rutledge wrote: "Moreover, had the Missouri District Court not enjoined

the bankruptcy proceedings, we may assume that the Bankruptcy Court would have been correct in not ordering the sale of the assets of National halted" (p. 509). This reflection was in the nature of an obiter, and no definite ruling was made on the suppositious facts, for the language used was conditional *i. e.*, "we may assume".

The facts, in relation to which that remark was made, are not the facts at bar. In the Duggan case, a bankruptcy proceeding for the subsidiary, already duly instituted, was pending in the Indiana Court when the reorganization petition was filed in the Missouri Court. Judge Rutledge merely indicated that under such circumstances the existing bankruptcy proceeding might be permitted to follow its course, unless the Bankruptcy Court were stayed by an order from the Reorganization Court.

In the instant case, we have the converse situation. Here a reorganization proceeding was instituted first. The involuntary petition in bankruptcy was filed much later, and at a time when, as Petitioner claims, the Reorganization Court still had jurisdiction over the Debtor and its assets. Whereas the propriety of the subsidiary's bankruptcy proceeding in the Duggan case was never in issue, here the very problem presented is whether the involuntary bankruptcy proceeding could be duly instituted under the particular facts.

The answer to be given is in no wise dependent upon the existence or non-existence of a stay under Section 113 of the Act operating against the Bankruptcy Court. Since there is involved only a single District Court, it could not, as a Reorganization Court, very well have stayed itself as a Bankruptcy Court. And the fact that there was no stay operating against the Respondents, to prevent them from acting as Petitioning Creditors in involuntary bankruptcy, is of no moment. Admittedly, they were personally free to file a petition in the sense

that, in the absence of a stay, they were free of the risk of committing contempt of court. But that still leaves unsolved the problem as to whether the District Court had the jurisdictional capacity to proceed with the petition.

II

The sufficiency of petitioner's proposed plea in abatement should not be determined as of a time following October 15, 1945, when this Court denied the Ladin application for a writ of certiorari to review the dismissal of the Chapter X petition, but should be determined as of July 17, 1945, when it was tendered in petitioner's proposed answer to the involuntary petition in bankruptcy.

The involuntary petition in bankruptcy was filed herein on July 2, 1945 (R. 1a-5a). The Receiver-Petitioner filed a petition in the District Court on July 17, 1945, praying that he be permitted to file his proposed answer, which contained the plea in abatement (R. 6a-19a). The District Court adjourned argument on that application until after this Court would pass upon the Ladin petition for a writ of certiorari to review the dismissal of the Chapter X petition. Respondents now contend that the sufficiency of the proposed plea in abatement should be assessed as of a time subsequent to this Court's decision on October 15, 1945, when the Ladin application for a writ of certiorari was denied, because at that time the plea in abatement had become moot.

The two passages from an editorial in American Law Reports they cite in support, and the cases which those extracts summarize, apply to wholly different situations than the one at bar. Notably, those in which there is no appeal in the first proceeding which operates as a supersedeas on the second. In such cases, if there be a dismissal or termination of the first proceeding *before* the

filing of a plea in abatement (the rule enunciated by the cited passage from page 1477, 118 A.L.R.), or *after* the filing (the rule enunciated by the cited passage from page 1480 from the same source), the plea is unavailing. If this distinction between those situations, and one in which appeal is pending with accompanying supersedeas, be not observed, the rule of abatement covering the latter situation,—being the one on which we rely—would have no significance.

No equitable or other reason is suggested why the District Court could add on October 27, 1945 to the facts pleaded by way of abatement on July 17, 1945, the newly created fact of dismissal on October 15, 1945. Or, to phrase the thought otherwise, why it is proper to deem the dismissal of October 15, 1945 retroactive, and made fictitiously existent as of July 17, 1945. Particularly so, in a case in which it is all important to determine as of what day the rights of the parties should be adjudicated. Had the District Court permitted Petitioner to intervene, file his answer, and forthwith try the issue of abatement, the plea would have been held beyond the operative effect of the rule Respondents now advance, and dismissal of the bankruptcy petition would have followed. The delay in arguing the application for leave to intervene should yield no different result.

CONCLUSION

Respondents' brief presents no reasons for a denial of the petition for a writ of certiorari. It is respectfully submitted that the writ should issue.

Dated: December 26, 1946.

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